

**Petitioner's Motion for Leave to Appeal in
Forma Pauperis.**

**UNITED STATES CIRCUIT COURT,
SECOND CIRCUIT.**

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,
Appellant-Petitioner,
against

HON. J. EDIN LAVALLEE, Warden of Auburn Prison,
Auburn, New York,
(Successor to Hon. Robert E. Murphy),
Appellee-Respondent.

SIRS:

The Appellant-Petitioner moves this Court for an order permitting him to prosecute an appeal from a final order entered herein on the 2nd day of May, 1966, in forma pauperis, pursuant to the provisions of Title 28, United States Code, Section 1915, and in support thereof attaches the affidavit of said appellant.

JAMES P. CARAFAS,
James P. Carafas,
Appellant-Petitioner Pro Se,
Post Office Address,
35-33 30th Street,
Long Island City 6, New York.

**Petitioner's Affidavit in Support of Motion for Leave
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UNITED STATES CIRCUIT COURT,
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UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,
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against

HON. J. EDIN LAVALLEE, Warden of Auburn Prison,
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(Successor to Hon. Robert E. Murphy),
Appellee-Respondent.

UNITED STATES OF AMERICA	} ss.:
STATE OF NEW YORK	
COUNTY OF NEW YORK	

JAMES P. CARAFAS, being duly sworn, says:

1. I am a citizen of the United States of America, and the appellant-petitioner in the above captioned matter.

2. I desire to prosecute an appeal from the final order dismissing the petition for a writ of Habeas Corpus, in the above entitled action, but because of my poverty and impecunious position, I am unable to pay the costs of such appeal or to give security therefor and still be able to provide myself and my dependents with the necessities of life.

Your deponent is presently on parole and has been on parole since October 4th, 1965. He has been employed

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as a trucker's helper and earns \$60.00 per week. Because of my incarceration I have incurred debts, which at present are heavily pressing upon me. My meager earnings leave much to be desired, however, I must carry on as best as I can with the hope that God and his earthly emissaries will aid me in my circumstances.

3. I believe that I am entitled to the redress I seek by such an appeal, and that such appeal presents substantial questions.

The nature of the questions to be presented upon such an appeal are as follows:

I contend that my constitutional rights have been abrogated, by the violations committed by Nassau County Detectives of the State of New York. Both my rights under the fourth and fourteenth amendments have been transgressed. I submit herewith a photostatic copy of the order entered dismissing my petition for a writ of habeas corpus and is marked exhibit "A". A copy of the notice of appeal is likewise appended and marked exhibit "B" for the Court's edification.

4. By the way of background, I submit the following factual circumstances encumbering the curtailment of my constitutional rights.

Apparently as the Trial Records indicates in the Nassau County Court for the State of New York, the following account was related.

The Nassau County Detectives, to wit: Grim and Kapler, were investigating an alleged larceny of several pieces of furniture found missing by a real estate developer in Oceanside, Long Island. The complaint was taken under consideration by the detectives, on or about June 3rd, 1959. The said detectives, in their quest for information, in the

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vicinity of the alleged theft, questioned a neighbor, who said that she had seen a gray cadillac with a U-haul trailer being towed away near the area.. The detectives ascertained the whereabouts of the tow truck, who had rendered assistance to the cadillac and were given the name of the owner of the said car.

Thereafter, the detectives visited the premises of the petitioner, by first entering the vestibule of the property in Long Island City, to wit: 33-53 30th Street, New York City. Upon talking to some person in the Doctor's portion of this building, they stated that the Appellant-Petitioner resided on the top floor with his wife.

The detectives, on learning this information, mounted the starway and went into the premises, where the Appellant was found stretched out on a divan and his wife was cleaning. The detectives over protestions of the appellant, although they were questioned whether they had a search warrant or an arrest warrant, commenced searching the apartment. One of the detectives slapped the appellant's wife, when she demanded that they exhibit a search or arrest warrant, saying that, that was his warrant. Thereafter, began a most bizarre set of events as ever witnessed, because they were ordered out of the premises, and Mrs. Carafas was handcuffed to the bathroom door. All this without a taint of color to do so, since they had no benefit of a legal right to do so, and, moreover, were out of their jurisdiction and, therefore, acted more like thugs, then human beings.

At the time of trial, some twenty-five photographs were admitted of furniture, which were taken on trucks and other places, all over the objections of the defense counsel.

It is submitted that the travesties committed by said detectives were not justified under the law, as the Constitution of the United States so provides.

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So that I may be able to assert my rights, I am asking this Court's assistance, and, were it not for the need, I would not make this application. This matter is brought to the attention of this Court, because it raises collateral issues of Constitutional violations, which is jurisdictionally appropriate for this Court, and is made in good faith.

WHEREFORE, your affiant prays that the relief sought herein may be granted, as I believe I am entitled to the relief sought.

JAMES P. CARAFAS,
Appellant *Pro Se*.

Sworn to before me this
31st day of May, 1966.

MAX FIRTEL,

MAX FIRTEL,

Notary Public,

State of New York.

No. 24-6303400.

Qualified in Kings County.

Cert. Filed in New York County.

Commission Expires March 30, 1968.

**Respondent's Opposing Affidavit and Cross-Motion
to Dismiss Appeal.**

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

UNITED STATES OF AMERICA ex rel. JAMES P. CARAFAS,
Petitioner-Appellant,
against

HON. J. EDWIN LAVALLEE, Warden of Auburn Prison,
Auburn, New York,
Respondent-Appellee.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BARRY MAHONEY, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent-appellee herein. I make this affidavit in opposition to petitioner-appellant's application for leave to appeal in forma pauperis from a decision and order of the United States District Court for the Northern District of New York (FOLEY, J.), dated May 2, 1966, which denied his application for a writ of habeas corpus, and in support of respondent's cross-motion to dismiss the appeal herein.*

At the time of his initial application for a writ of habeas corpus, petitioner was incarcerated in Auburn State Prison,

* The District Court granted a certificate of probable cause in the same order in which it denied the application for the writ.

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to Dismiss Appeal.*

pursuant to a judgment of the Nassau County Court, rendered December 13, 1960, sentencing him to concurrent terms of 3 to 5 years imprisonment for the crimes of burglary in the third degree and grand larceny in the second degree. He is presently on parole from these sentences.

Petitioner's claim in the habeas corpus proceeding is that the fruits of an illegal search and seizure—specifically, some 25 photographs of items of furniture stolen from a model home in Oceanside, Long Island, and found in petitioner's apartment on June 3, 1959—were introduced into evidence at his trial. The complicated history of the litigation of this claim is set forth in Judge Foley's opinion.

The relevant facts for present purposes were developed at the petitioner's 1960 trial, a 1962 hearing in the Nassau County Court, and a 1965 hearing in the District Court. The transcripts of each of these proceedings are a part of the record herein. At the District Court hearing, the arresting police officers (Nassau County Detectives John Kapler and Edward Grim), petitioner, and petitioner's wife each testified. The facts found by the District Court are summarized by Judge Foley in his decision (R. 1327, 1330-1334). Briefly, they are as follows:

Detectives Grim and Kapler, investigating the report of a burglary of a model home in Oceanside, went to the location on the morning of June 3, 1959. They were taken through the premises by a Mr. Wedgewood, who described the pieces of furniture which had been taken from the model home and showed them the remaining pieces of the bedroom set which matched the pieces taken by the burglars. While at the location they spoke to a neighbor, who told them that earlier that morning she had seen a car—"a black and gray Cadillac with a U-Haul trailer with New Hampshire plates attached to the rear"—stuck in the sand by the model house. The neighbor told them that she saw an AAA truck come and assist the car and trailer

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out of the sand, and described the appearance of the man and woman in the car. After receiving this information, the detectives located the tow truck operator and, through him, ascertained the name and address given by the person who had been assisted—James Carafas, 3553—30th Street, Astoria. They proceeded to that address, where they found a black and gray Cadillac, with a U-Haul trailer bearing New Hampshire plates attached to the rear, parked in front of the house.

The facts with respect to the investigation of the police officers, up to the point at which they arrived in front of petitioner's residence in Astoria, have never been in dispute in this proceeding. The subsequent events, however, have been the subject of sharply divergent testimony. It has been petitioner's contention that the police officers went through locked front doors at the front of the house, and up the stairs to his second floor apartment, burst into the apartment where he was resting on a couch, arrested him and his wife, and then commenced to search the apartment. As is apparent from his present application to this Court (pp. 2-3), he still claims that this is the true story of the events. Petitioner's version of the facts has, however, been completely rejected by the District Court which, after having had an opportunity to assess the credibility of petitioner, his wife, and the arresting officers, accepted as true the testimony of the police officers (Op., R. 1332).

The detectives testified that they arrived at the address at approximately 1:30 P.M.; that they noticed a sign on the front door of the house indicating that they were arriving at a time when a Dr. Shapiro was having office hours in the premises; that they passed through unlocked outer and inner doors of the house and stopped in the doctor's waiting room to inquire where the petitioner lived; that upon being informed that the petitioner lived upstairs, Detective Grim went over to the foot of the stairs and

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shouted "Carafas"; that Carafas came over to the top of the stairs and identified himself; that, as they looked up the stairs and began to ascend them, the detectives could see a dresser on the second floor landing which corresponded to the descriptions of the furniture stolen from the model home; that they arrested petitioner and his wife on the landing, the latter as she stood in the open archway leading to the apartment; and that they immediately thereafter made the search complained of.

In accepting the detectives' account of the relevant events as true, Judge Foley noted that it was well corroborated. Thus, for example, the signs on the front of the house (see Resp. Ex. A., R. 1325) made it clear that part of the premises were occupied by a doctor who was having office hours at the time the Detectives arrived at the house, and the doctor himself testified that he had unlocked the doors on the day in question; that he was present in his office between 1 and 2 P. M. on that day; and that he heard a commotion upstairs (see Op., R. 1332).

It is clear from the foregoing that the District Court was quite correct in concluding that under the circumstances the entry of the Detectives into the premises which petitioner shared with Dr. Shapiro was lawful (*Cf. Polk v. United States*, 314 F. 2d 837 [9th Cir., 1963], cert. denied 375 U. S. 844 [1964]; *Schnitzer v. United States*, 77 F. 2d 233 [8th Cir., 1935]; *Rouda v. United States*, 10 F. 2d 916, 998 [2d Cir., 1926]; *United States v. Monticallos*, 349 F. 2d 80 [2d Cir., 1965]); that the Detectives' observation of the piece of stolen furniture resting on the second floor landing, together with petitioner's identification of himself as "Carafas"—when viewed in light of the information known to the detectives prior to their entry into the house—gave them ample probable cause for arresting petitioner and his wife (*Cf. Ker v. California*, 374 U. S. 23,

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34-35 [1964]; *Henry v. United States*, 361 U. S. 98, 102 [1960]; *United States ex rel. Coffey v. Fay*, 344 F. 2d 625 [2d Cir., 1965]; *Ellison v. United States*, 206 F. 2d 476 [D. C. Cir., 1953]), and that the search of the apartment was incident to this lawful arrest (*Cf. United States v. Rabinowitz*, 339 U. S. 56, 63 [1950]; *Ker v. California*, *supra*, at 41 [1963]). See generally Respondent's Memorandum After Hearing, R. 1302-1324, in which the facts and the law are discussed in greater detail.

WHEREFORE, your deponent respectfully requests that petitioner's application for leave to appeal in forma pauperis be denied and that the appeal herein be dismissed.

/S/ BARRY MAHONEY

Sworn to before me this
27th day of June, 1966.

/S/ MICHAEL H. RAUCH
Assistant Attorney General
of the State of New York